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SUPREME COURT OF THE UNITED STATES

October Term 1958

MARVIN IRVING TAMARKIN,

Petitioner

-vs-

UNITED STATES OF AMERICA

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of conviction of petitioner by the United States District Court for the Southern District of Florida for a violation of the Universal Military Training and Service Act.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. (See Appendix A, page 1, infra, for opinion). The opinion of the District Court is unreported. (See Appendix B, page 1, infra, for opinion.)

JURISDICTION

The judgment and mandate of the Court of Appeals was entered in this case on January 7, 1959. A petition for rehearing was filed on December 5, 1958. The petition for rehearing was denied without opinion on December 17, 1958. The time for filing this petition expires on January 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1). (See also Rules 37 (b) (2), and 45 (a) Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U.S.C.A. Section 3231.

QUESTIONS PRESENTED

I

Did the Selective Service Appeal Board properly apply the law to the facts and the facts to the law when, on July 2, 1956, they considered the appeal of the Petitioner?

II

Since the regulations require that when a registrant's classification was reopened and considered anew by his Local Draft Board, such classification shall be, and have the effect, of a new and original classification, did the Local Draft Board deny the Petitioner procedural due process of law by holding that he was not entitled to a new physical examination and the 21 day waiting period thereafter before ordering him to report for induction because he had been given a physical examination and the 21 day waiting period in a previous classification which had no bearing on or relation to his present classification?

III

The fact that the petitioner's classification was reopened and considered anew having heretofore always been accepted by the parties hereto, and it never having been controverted between the petitioner and the Government, the record being devoid of such controversy, can the Court of Appeal, on its own motion and without giving Counsel for the parties the opportunity to consider or argue the point, interject a holding which finds as a matter of law that the petitioner's local board classification was not reopened and considered anew in the face of his Selective Service record which says that it was?

SELECTIVE SERVICE REGULATIONS INVOLVED

Part 1625 — Reopening and Considering Anew Registrant's Classification.

"Authority: 1625.1 to 1625.14 issued under sec. 10, 62 Stat. 618, as amended: 50 USC App., 460.

"Source: 1625.1 to 1625.14 contained in E.O. 9988, 13 F.R. 4874, Aug. 21, 1948, except as otherwise noted. Redesignated act 14 F.R. 5021, Aug. 13, 1949.

"1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Classification Anew.

"1625.11 Classification considered anew when reopened. When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

"1625.12 Notice of action when classification considered anew. When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant mail notice thereof on Notice of Classification (SSS Form #111) to the persons entitled to receive such notice or advice on an original classification under the provisions of 1623.4 of this chapter.

"1625.13 Right of appeal following reopening of classification. Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

"1625.14 Order to report for induction to be canceled when classification reopened. When the local board has reopened the classification of a registrant, it shall cancel any order to Report of Induction (SSS Form #252) which may have been issued to the registrant. If after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner."

Section 1628.10—"Who will be examined."

Authority: sections 1628.1 to 1628.26 issued under sec. 10, 62 Stat. 618, as amended; 50 USC App. 460.

"Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

(E. D. 18292, 16 F.R. 9862, Sept. 28, 1951.)

Quotas and Calls.

Authority: Sec. 1631.1 to 1631.7 issued under Sec. 10, 62 Stat. 618 as amended; 50 USC App. 460.

Section 1631.7—"Action by local board upon receipt of call."

"Each local board, upon receiving Notice of Call on Local Board (SSS Form #201) from the State Director of Selective Service for a specified number of men shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the armed forces and to whom the local board has mailed a certificate of Acceptability (DD Form #62) at least 21 days before the date fixed for induction: . . ."

(Paragraph (a) amended by E. O. 10659, 21 F.R. 1103, Feb. 17, 1956.)

Classification Rules and Principles.

1622.14 Class I-O Conscientious Objector.

(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

(E. O. 10292, 16 F.R. 9862, Sept. 28, 1951, as amended by E.O. 10420, 17 F. R. 11593, Dec. 19, 1952)

National Headquarters Selective Service System, Local Board Memorandum #28, paragraph 2 (a):

"Except in the cases of posponed registrants, the 120 day period of validity continues in effect for armed

forces physical examinations. However, when a registrant whose physical examination is more than 120 days old is selected for induction, the local board shall not order him to report for armed forces physical examination but shall order him to report for induction. In each such case the registrant will receive a complete examination at the armed forces examination and induction station and when found acceptable will be immediately inducted."

STATEMENT OF THE CASE

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act. (50 U.S.C. App. Sec. 462.) Petitioner was charged with refusing to submit to induction. Petitioner pleaded not guilty to the charge. Prior to trial the petitioner stipulated with the government that he refused to submit to induction.

The case proceeded to trial before the judge without a jury, which was waived. Testimony was received and documentary evidence (Government Exhibit #1) was admitted into the record. The petitioner filed a supporting brief asserting two defenses to the charge.

A motion for judgment of acquittal was made at the close of all the evidence. This motion was denied. The judge found the petitioner guilty, entered a judgment of conviction and sentenced the petitioner to twelve months in the cutody of the Attorney General. The Court filed a written opinion giving reasons why the judgment was rendered (See Appendix B, page 1.)

The case was duly appealed to the Court below. The

case was duly briefed, argued, and submitted, resulting in an affirmance of the conviction. A petition for rehearing in the Court below was denied.

STATEMENT OF FACTS

The petitioner was born on July 26, 1930. The petitioner first registered under the Selective Service System on September 17, 1948, at the age of eighteen (18). On December 19, 1950, the petitioner was classified 1-A by his Local Draft Board. On March 20, 1951, in accordance with the provisions of Selective Service Regulations seeking reclassification as a Conscientious Objector (4-E). The Local Draft Board held a hearing on that same day the petitioner was classified 4-E. On November 26, 1951, the petitioner's Selective Service System File was forwarded to the Selective Service System State Headquarters pursuant to their request. On December 6, 1951, the petitioner was again classified 1-A by his Local Draft Board. The petitioner took his regular appeals to that classification and on February 6, 1952, the Selective Service System Appeal Board for the Southern District of Florida reviewed the petitioner's Selective Service System File and decided that the petitioner should not be classified as either 1-A or 1-A-O. On April 13, 1954, that same Appeal Board classified petitioner 1-A. On July 30, 1954, the petitioner was ordered to report for induction. He reported but refused to submit to induction. The petitioner was reported as delinquent and prosecution for violation of Selective Service System Regulations was commenced. On September 19, 1955, the United States Attorney for the Southern District of Florida declined to prosecute the petitioner for the alleged violation on the ground that procedural due process of law had been denied the petitioner when the de-

fendant was not given a fair resume of the investigation of his background as made by the Federal Bureau of Investigation. On October 20, 1955, the petitioner's classification was re-opened and considered anew and the petitioner was placed in 1-A. The petitioner appealed this classification and on March 29, 1956, the petitioner appeared before the Honorable Henry K. Gibson, Special Hearing Officer for the Department of Justice. After an extensive hearing conducted by the Hearing Officer, which searchingly investigated the religious training and belief of the petitioner, the Hearing Officer recommended that the petitioner be classified as a Conscientious Objector. The Honorable T. Oscar Smith, Special Assistant to the Attorney General reviewed the Hearing Officer's recommendations and he recommended that the petitioner be classified as 1-A. This the Appeal Board did and on July 6, 1956, the petitioner was officially informed of the Appeal Board's action. Simultaneous with the receipt by the petitioner of his notice of classification, he also received an order to report for induction on July 23, 1956. On July 26, 1956, the petitioner would have become twenty-six (26) years old, and therefore, ineligible for the draft because of over-age. The petitioner duly reported for induction on the required date and some time later that same day he refused to submit to induction. On July 25, 1956, the petitioner was indicted for his refusal. The petitioner waived jury trial and was tried for the offense charged. In an opinion filed on March 6, 1958, by the Honorable Emmett C. Choate, U.S. District Judge for the Southern District of Florida, the petitioner was found guilty as charged. (See Appendix B, page 1.) The petitioner moved to vacate the judgment of guilty and in the alternative moved for a new trial. The trial court denied both motions in an order dated April 8, 1958.

REASONS FOR GRANTING THE WRIT

To save expense for the Government so as not to waste the time of the Court the Petitioner stipulated with the United States Attorney that on July 23, 1956, he refused to submit to induction which act was a violation of Statute for which he was indicted, and for which he was tried. The leading case of **Estep v. United States**, 66 SCT 423, permits a draft classification to be overturned when it has no basis in fact, but not before the criminal prosecution is under way. The Petitioner must first exhaust all of his administrative remedies. **Watkins vs. Rupert**, 224 F2d 47.

The question propounded by the Petitioner to the Court can be restated another way in two parts: Do the beliefs which the Petitioner says he holds amount to the "Conscientious opposition to participation in war in any form" demanded by Congress as a prerequisite to conscientious objection deferment? And, secondly, is the Petitioner sincere when he says he holds these beliefs?

Considering the sincerity question first, the report of the Department of Justice reviewing officer, Mr. T. Oscar Smith, dated May 25, 1956, states on page 6, Givernment Exhitit # 1 that the hearing officer "concluded that the registrant's sincerity was real and actual . . ." The fair resume of the report made by the Federal Bureau of Investigation shows over and over again, in instances too numerous to cite, that the informants believed in the sincerity of the Petitioner. Furthermore, looking at the question from the other direction, there is nowhere in the Selective Service file of the Peti-

tioner any statement or information which makes an allusion to the lack of sincerity of the Petitioner. Where it is admitted that the Petitioner is sincere, the Court is relieved of the task of searching the record for basis in fact to support a finding of insincerity; the sole question remaining in the case is one of law—to repeat, do the beliefs which the Petitioner says he holds amount to the conscientious opposition to participation in war in any form demanded by Congress as a prerequisite to the conscientious objection deferment. **Sicurella vs. United States,** 75 SCT 403.

The beliefs of the Petitioner were first expressed to his Local Draft Board in the special form #150 for conscientious objectors (Government's exhibit #1), then at the hearing before his Local Draft Board on March 20, 1951, when he was granted conscientious objector status, then at the two hearings held before the Department of Justice hearing officers, the second of which, on March 29, 1956, recommended that the Petitioner be granted conscientious objector status, and in the numerous appeals filed by the Petitioner in his own behalf since November 15, 1955. At the two hearings held by the Department of Justice, the Petitioner presented no written material to substantiate his position; the hearings consisted of oral interrogatories propounded by the hearing officers to the Petitioner. It is interesting to note, therefore, that the Local Draft Board, when it reopened the Petitioner's classification and classified him anew as 1-A, on October 20, 1955, used material at least 4½ years old, since they did not ask the Petitioner for any new material, nor, indeed, did they ask him if his views had changed in any way since 1951. Furthermore, they did not request a new special form #150 which seems to be re-

quired if the provisions of Section 1625.11, 32 CFR, are to be complied with. An appeal by the Petitioner to the Local Draft Board requesting reconsideration of the 1-A classification was denied. This appeal was read by them on January 12, 1956. In compliance with the regulations the Petitioner file was forwarded to the Appeal Board who, in turn, forwarded the file to the Department of Justice. Mr. Henry K Gibson, held a hearing and recommended a conscientious objector classification for the Petitioner. The reviewing officer disagreed and recommended 1-A and so the Appeal Board found on July 2, 1956, after the Petitioner had filed a rebuttal to the reviewing officer's recommendation. There is no point in discussing at length the appeals filed by Petitioner, they are in his Selective Service file and are part of the evidence in this case. Let me say, however, that what was stated in the appeals is entirely consistent with the position of the Petitioner ever since he first registered for the draft.

An examination of the Petitioner's special form =150 shows that the Petitioner believes basically in a Supreme Being, is conscientiously opposed to the taking of life, whether animal or human, for any purpose whatsoever, was raised from birth as a strict vegetarian, under no circumstances believes in the use of force, has often given public expression to his views, considers vegetarianism a religious doctrine and the Vegetarian Union a religious sect, and believes that Vegetarianism upholds the sacredness of life as an inviolable principle because it respects the birth right of every creature to life and perfection under the eternal laws of nature, and seeks peace through understanding and universal brotherhood.

Now, these expressions of the Petitioner as made in his special form are fragmentary and certainly do not state completely his religious training and belief. It is inconceivable that a form which provides a line or two for the answer to such profound questions as the requirement to describe the nature of the Petitioner's belief in a Supreme Being, and the tenets or creed of his religious group (question 2, series 2, and question 5e, series 5) can elicit adequate or complete answers sufficient to permit a proper administrative determination respecting the Petitioner's claim. The fuller exposition made by the Petitioner to the Local Draft Board on March 20, 1951, and the hearing officer on March 29, 1956 prompted them to grant him or recommend the classification he sought. The two appeals filed by the Petitioner since November, 1955, and which are evidence in the case consistently expressed the religious training and belief of the Petitioner.

The reviewing officer although admitting that the hearing officer's recommendation was favorable (and also, therefore, the Federal Bureau of Investigation report, since the hearing officer uses the information elicited therein) in his recommendation that the Petitioner's claim be denied stated as his grounds that:

"Although the registrant asserts an individual belief in a relation to a Supreme Being which to him involves duties superior to those arising from any human relation, theviews upon which he bases his claim are essentially philosophical and involve a merely personal moral code." (page 6 of report)

and therefore, the Petitioner did not come within the

meaning of Section 6 (j) of the **Universal Military, Training and Service Act,** as amended which reads in part as follows:

"Religious training and belief in this connection means as individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relations, but does not include essentially policital, sociological, or philosophical views or a merely personal moral code."

The reviewing officer quoted at great length in his report concerning certain tracts and pamphlets the Petitioner gave to his Local Draft Board in 1950 to help explain some of the meaning of vegetarianism. He also cites the Federal Bureau of Investigation report as showing that there was some contention amongst vegetarians themselves as to whether vegetarianism is a philosophy, way of life, or a religion although he admits that almost all of those questioned "generally believed that the (Petitioner) and his family treat vegetarianism as a religion" (Page 4 of report).

The reviewing officer quoted others from the Federal Bureau of Investigation report who purported to give varying interpretations of the meaning of Vegetarianism and then summed up the hearing officer's report as follows:

"The hearing officer reported that registrant belongs to no ordinary religious sect and bases his conscientious objections entirely and solely upon his convictions as a vegetarian and upon his membership in the Vegetarian Society to which he belongs. The registrant asserted a

decided belief in the Bible, passages of which he read to the hearing officer and which he interpreted to be the will of God that no animal including human beings should be killed. He also expressed belief in a Supreme Being and indicated that he regards vegetarianism as a religious belief. The hearing officer reported that the registrant appeared to be thoroughly indoctrinated and was able to explain his attitude in an intelligent manner, and that the two witnesses he presented corroborated his belief, his sincerity and the extent thereof."

The hearing officer pointed out that there is certainly substantial reasoning to support the very plausible argument that vegetarianism is not a religion but is merely a "sociological or philosophical view or a merely personal moral code" under the provisions of section 6 (j) of the Act. However he concluded that "registrant's sincerity is real and actual and that he has submitted very clear evidence that his convistions amount to a religious belief, misguided and erroneous as they might appear." Accordingly, he recommended that the registrant's claim be sustained. (Pages 5 & 6 report.)

Based upon these facts the reviewing officer recommended as he did to the Appeal Board.

The Selective Service file of the Petitioner does not reveal what reasoning the Appeal Board used to arrive at its decision; there is nothing in the Selective Service file except a bare statement of the result of the vote taken. At any rate it can be assumed that the reviewing officers' recommendation bore great weight. That that recommendation was erroneous, there can be no doubt, and the requirement of the Estep case that the classification have a "basis in fact" has not been met.

The reviewing officer completely disregarded the hearing officer's report, the appeal of the Petitioner, and the statements of informants, substituting his own judgment and the opinions of others rather than applying the test directly to the individual (the Petitioner). This is clearly contrary to Section 6(j. which is concerned with the "individual's belief" rather than what others think the "belief" should be, since they, too, belong to the same religious group and they think differently about the question. **United States vs. Everngam**, 102 F. Supp. 128. There is apparent disregard of the statements of these same people who profess the belief that the Petitioner's training and beliefs in vegetarianism are religious in nature.

Assuming that the American Vegetarian Union is an ethical society, must the Petitioner belong to some other religious sect or group who profess a "conscientious objection to participation in war in any form" before he can be given conscientious objector status? In **United States vs. Kauten**, 133 F 2d 703, the Court said:

"The basis of the exemption is the existence of a conscientious scruple against war in any form RATHER THAN AN ALLEGIANCE TO A DEFINITE RELIGIOUS GROUP OR CREED", (Emphasis supplied).

There is nothing in the Statute or regulations which require membership in a sect or organization in order to qualify as a conscientious objector so when a registrant provides sufficient evidence as to his honesty and sincerity and his religious training and beliefs and there is nothing in his file to prove otherwse, then he should be classified as a conscientious objector. **United States vs. Alvies**, 112 F Supp. 618.

Does the religious training and beliefs of the Petitioner qualify him for exemption- What standard must the Appeal Board use to apply Congressional desires and intent respecting conscientious exemption to a specific set of facts embodying one person's claim? The Statutes are silent and so was Congress and this was deliberately so. The spirit of the legislation and the intent of Congress might have been defeated if more rigid statutory formulary had been created since intensity, magnitude and validity of religious training and beliefs are not susceptible to quantitative analysis within defined limits of precision and accuracy. **United States vs. Nelson**, 221 F 2d 623.

The petitioner understands that his religious views are not conventional, and to some may even seem bizarre. The discussion of the Court in the Nelson case shows Congress evidently intended to give us as broad an application of their desires as possible, the only test being that the registrant base his claim on religious training and belief. In **United States vs. Horst**, decided December 12, 1957, in Detroit, Michigan, and as yet unreported, Eastern District of Michigan, Southern Division #36149, Judge Ralph M. Freeman, in granting Defendant's Motion for acquittal (Defendant asserted his claim for exemption was based on the thesis that "God is Love") discussed orthodox and unorthodox religious views and felt constrained to acquit the Defendant of the charge of refusing to submit to induction since the Defendant met the test as to whether his beliefs were religious rather than merely a personal moral code, regardless of their lack of orthodoxy of conventionality. Along these same lines the Court of Appeals for the District of Columbia in an unreported decision filed in December, 1957, unanimously held that an organization which calls itself Washington Ethical Society was a

"religious corporation or society," restoring their tax exemption as such.

The report of the reviewing officer to the Appeal Board was clearly improper and illegal since there was nothing in the file of the petitioner which was incompatible with his proof of exemption. Where it is impossible to determine on exactly what grounds the Appeal Board decided, the reviewing officer's recommendation to them must be legal, otherwise it will be assumed the Appeal Board's action was itself illegal since it considered an illegal recommendation. **Sicurella vs. United States, Supra, citing United States ex rel. Levy vs. Cain,** 194 F 2d 338, 342; **United States** vs. **Balogh,** 157 F 2d 939, 943-44, judgment vacated on other grounds 67 SCT 625; **United States vs. Everngam, Supra.** The petitioner contends therefore, that the Appeal Board's action in classifying him 1-A was illegal, and therefore the trial court should have granted the Petitioner motion of acquittal.

This case also involves interpretation of Selective Service regulations. Local Draft Board #47 ordered the petitioner to report for induction on July 23, 1956 while in his new classification, without first giving the petitioner an armed services physical examination and allowing him the usual 21 day waiting period thereafter before ordering him to report for induction. The act of the Local Draft Board posed the question of whether a registrant whose classification was reopened and considered anew can require that he be afforded all of his administrative remedies and procedures while in this new classification. In short, must a registrant previously classified, and who now gets a new classification be given an armed services physical examination and the 21 day waiting period thereafter before he can be ordered to report for induction?

Section 1625.11, entitled Classification Anew, says as follows:

"When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened."

The Local Draft Board and the Selective Service System for the State of Florida quite obviously acted in accordance with this section and the requirements of Sections 1625.12 and 1625.13 when they permitted the petitioner to file once again all of his appeals provided him by the regulations, and to entertain them, and make rulings on them in accordance with the requirements of the regulations even though these very same appeals had been submitted and ruled upon before in the petitioner's previous classificiation.

After permitting the petitioner to exercise all of his appellate and procedural rights, the Local Draft Board then undertook the unlawful, arbitrary, and oppressive procedure of ordering the petitioner to report for induction without first giving him an armed services physical examination and the customary 21-day minimum waiting period thereafter before ordering him to report for induction. This is clearly contrary to and in violation of Section 1628.10, 32 CFR, page 341, which provides, in part, as follows:

"Who will be examined:—Every registrant before he is ordered to report for induction . . . shall be given an armed forces physical examination under the provisions of his part except that a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

Note that this section requires the physical examination to be given before the order to report for induction is sent to the registrant who is not delinquent or a volunteer. It does not permit a situation wherein the registrant is physically examined at the induction station immediately before his induction after he has been ordered to report there for induction, unless the registrant is delinquent or has volunteered. It is admitted by all parties concerned that the Petitioner is not delinquent nor is he a volunteer.

The order to report for induction was invalid because it also violated, in two ways, the requirements of Section 1631.7, 32 CFR. First, the Petitioner was never mailed a Certificate of Acceptability (DD Form #62) during his current classification since he was not given a physical examination before he was ordered to report for induction; the Local Draft Board therefore, could not legally fix a date for induction. Secondly, the date he was ordered to report for induction (July 6, 1956) was not at least 21 days before the date fixed for induction (July 23, 1956) and, therefore, he was deprived of the 21 day waiting period.

Section 1631.7, 32 CFR states as follows:

"Each local board, upon receiving Notice of Call on

Local Board (SSS Form #201) from the State Director of Selective Service for a specified number of men shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the armed forces and to whom the Local Board has mailed a Certificate of Acceptability (DD Form #62) at least 21 days before the date fixed for induction. . ."

The entire procedure was also a violation of Section 1625.14 since the Petitioner was not ordered to report for induction in the "usual manner". Instead the very unusual procedure outlined below was used by the Petitioner's Local Draft Board in their effort to induct him. The Government's position relied for authority on paragraph 2(a), Local Board Memorandum #28, issued by National Headquarters, Selective Service System. But paragraph 2(a) of Memorandum #28 could only have valid effect when it is applied to a situation wherein the registrant has already been given a physical examination during his current classification. This conclusion is elementary; if a registrant who is not delinquent or a volunteer has never had a physical examination and was ordered to report for induction this would be in clear violation of the requirements of Section 1628.10, 32 CFR, since the order to report came before his physical examination. But what of an instance where the physical examination was given during a previous classification as in the Petitioner's case? Section 1625.11, 32 CFR requires that this latest classification be treated as an entirely new one. Paragraph 2(a) Memorandum #28 permits a physical examination after the registrant has been ordered to report for induction. Is a physical examination really an im-

portant and necessary step in the chain of administrative events leading to induction? Certainly so, since according to Section 1628.10 a registrant who is not delinquent or a volunteer cannot be ordered to report for induction without first being given his physical examination. The registrant has a right to demand one. **Miller vs. United States**, 169 F 2d 865; **Mason vs. United States**, 218 F 2d 375. Will the physical examination of the Petitioner taken during a previous classification and more than two and one-half (2½) years old, fulfill this requirement? Certainly not, for to permit this would instantly create a violation of Section 1625.11, which requires that a registrant whose classification was reopened and considered anew "shall be classified by the Local Draft Board as if he had never before been classified. Such classification shall have the effect of a new and original classification even though the registrant is again placed in the classification that he was in before his classification was reopened". The requirements of this section are precise. Note the words: "new", "original", "never before been classified". They do not permit a carrying-over of any procedures or administrative actions from other and previous classifications. The Local Draft Board must proceed as if they had never seen or heard of the registrant before. There is no lee-way, no equivocation, no provision for circumvention by permitting opinion of the Local Draft Board to intervene. Its language is that of mandate and finality. There can be no carry-over into the new classification of any previous act or procedure, no matter how small or of apparent unimportance.

Recognizing this then, is there a conflict between the provisions of Section 1625.11 and paragraph 2(a) of Memorandum #28? There is if the Local Draft Board

insists on using the result of a physical examination (or of any other procedure or act) taken of the registrant in another and previous classification. There is none if the Local Draft Board will order a physical examination in proper time during the new classification.

The regulations governing induction must be read together; they are not mutually exclusive nor are they intended to be. **Mason vs. United States**, supra, footnote #7 at 379. Section 1625.11, 32 CFR, requires that when classifications are reopened and considered anew by the Local Draft Board such reclassifications shall be, and have the effect of, a new and original classification. Section 1625.14 provides that after the registrant is classified anew into a class available for service, he shall be ordered to report for induction in the "usual manner". The "usual manner" is described in Section 1631.7 as requiring the Local Draft Board to order for induction only those men who have had a Certificate of Acceptability mailed to them at least 21 days before the date fixed for induction. A Certificate of Acceptability, in a new and original classification, can only be mailed **after** the registrant has successfully passed a physical examination given during the new classification and cannot be mailed before. It is readily apparent that the haste of the Local Draft Board in calling up the Petitioner was prompted by the near approach of his 26th birthday just four days away. Regardless of the urgency to the Local Draft Board, the requirements of Statute must be complied with. Failure by the Local Draft Board to follow the regulations deprived the Petitioner of procedural due process of law. A registrant has the right to pursue his administrative remedies and procedures to the end; therefore an order to report for induction which interrupts these procedures is void. **Tung**

v. U. S. 142 F2d 919. The Local Draft Board should have acted and failed to do so. All orders issued by it thereafter, including the order to report for induction, were invalid. **Tomlinson v. Hershey** etal, 95 F Supp. 73.

The Trial Court, in its opinion dated March 6, 1958, (Appendix B, on page 3 thereof) stated . . . "It cannot be said that there was no basis in fact for the Selective Service Board's classification in this case . . . the views of the (Petitioner) other vegetarians, and the society to which the (Petitioner) belongs, indicate that his beliefs are more of a philosophical nature. The term "religion" is broader than such a philosophy or a merely personal moral code. While each man may find God in his own way, to grant the (Petitioner) an exemption from service on the basis of his "religion of vegetarianism" would open the door to evasion of our Selective Service laws by diverse and unlimited varieties of individual "religious" expression."

(Earlier, on the same page of the opinion (page 3) the Court stated that "he (the Petitioner) admitted that he could serve in the armed forces so long as killing was not required" The Trial Court was in error in this since nowhere in the record of testimony of the Petitioner is such an admission made by him. Indeed, the Petitioner reiterated again and again his reasons why he, because of religious training and belief, could not serve in the armed forces under any circumstances.)

The test the Trial Court used to conclude that the Petitioner's beliefs were not religious in nature but were merely a personal moral code was erroneous per se. What other vegetarians may believe and the beliefs of any so-

cieties to which the Petitioner may have belonged cannot be used as a gauge to determine whether the Petitioner personally conforms within the structures delineated by Congress when they wrote the statute. **U. S. v. Kauten,** supra; **U. S. v. Alvies,** supra; **U. S. v. Everngam,** supra. The test applies to the Petitioner alone and no specific training or duties need be shown to establish conscientious objector status other than his training in his home and by leaders in his religious group. **Riles** v. **U. S.,** 223 F2d 786.

The Trial Court, in its opinion, also gave great weight to what it apparently considered was a bizarre position the Petitioner took respecting his interpretation of Scripture —the words the Court used were "diverse and unlimited varieties of individual religious expression"—and also used that as a test of the Petitioner's religious training and beliefs. That this test is erroneous is readily apparent on its face. The Court endeavors to limit the religious training and beliefs of possible conscientious objector claimants within conventional confines and either disregarded or refused to apply in this case the tests laid down in the Nelson and Horst cases. **U. S. v. Nelson**; **U. S. v. Horst,** supra. The Petitioner may have his own construction and meaning for the Scriptures and is not bound by that of courts (and boards). **Williams** v. **U. S.** 216 F 2d 350.

It is well worth considering what the Court of Appeal for the Fifth Circuit said in **Williams** v. **U. S.** cited supra, and reiterated in **Riles** v. **U. S.** cited supra:

> "If there is no evidence before the board (or the Court) to refute the Defendant's professed be-

lief and if that belief is sincere on his part, then under the Act of Congress he was exempt from training and service. (There is) no such evidence in the record. A thorough reading of the record casts no doubt on the Defendant's sincerity. Congress in its wisdom considered it more essential to respect a man's religious belief, than to force him to serve in the Armed Forces. The draft boards and the courts are bound to carry out that policy."

The Court of Appeal in its opinion, (see Appendix A) on its own motion, decided that the action taken by the local board on October 20th, 1955, regarding the classification of the Petitioner was not a reopening and consideration anew as contemplated by Section 1625.11, 32 C.F.R., but instead was a carry-over of the Petitioner's classification previous granted him in April, 1954. The Court based its result on the premise that the requirements of Section 1625.2, 32 C.F.R. had not been met (pages 5 & 6 of the Opinion). The Selective Service file of the Petitioner (Government Exhibit #1) shows that this result reached by this Court is clearly erroneous.

First, the Appellee (at page 1 of this Brief) never controverted the statement of the case as made by the Petitioner wherein the Petitioner claimed that the act of the local board taken on October 20, 1955, was a reopening and consideration anew of his classification (page 2 of the Petitioner's Brief). The Appellee and the Trial Court have never, at any time past, otherwise argued in brief or orally, or in opinion, and the record is devoid of controversy on this point.

Government's Exhibit #1, on the cover sheet (item #14) under date of September 21, 1955, says as follows:

> "Received letter from Charles R. Tully, Executive Officer, State Headquarters pointing out that Regulations permit board to reopen and reconsider registrant's Classification anew".

The letter referred to above (item #94, Government's Exhibit #1 dated September 20, 1955) addressed to the local board states in part as follows:

> "While the US Attorney cannot now successfully prosecute this case due to the fact that the Appeal Board's handling was in conflict with the decision of the U. S. Supreme Court in the above cited case (United States v. Gonzalez, 348 U. S. 407) and did not conform to the handling prescribed in Operations Bulletin #123 **the Regulations permit you to reopen and reconsider registrant's classification anew. After reclassification registrant is entitled to all rights and privileges which would accrue to him in original classification including right of personal appearance and appeal.**" (Emphasis supplied)

The cover sheet (item #14) under date of October 20, 1955, contains these entries made by the local board:

> "Registrant's file reviewed Board unanimously agreed to reopen classification"
>
> "CLASSIFIED IN CLASS 1-A"

"Form 110, notice of Classification mailed".

In keeping with the instructions received from State Headquarter's in item #94, supra, the local board met, "agreed to reopen classification", Petitioner was "classified in 1-A" and had his "Form 110, notice of classification mailed" (item #14 and see above) and later on was allowed to file an appeal of the classification given him on October 20, 1955. This appeal was addressed to, and filed with, the local board and it was this appeal, which sought to reopen the classification given the Petitioner on October 20, 1955, to which the local board referred when they stated, on January 12, 1956, that they declined to "reopen the classification" (item #15, Government's Exhibit #1), and not the classification granted the Petitioner in April, 1954, as the Appellate Court erroneously believed. (Appendix A, page 5, Opinion of the Court.)

There can be no doubt that the local board and the appeal board intended to reopen and consider the Petitioner's classification anew; they were clearly following the dictates of the letter of September 20, 1955, (item #94) from the State Director of the Florida Selective Service System. The State Director's office should certainly understand Selective Service regulations well enough to know what should be done. If there was no need to reopen the Petitioner's classification, the State Director would have said so and there would have been no need to write the letter of September 20, 1955, (item #94) and use the language quoted above. But the letter was written, the classification was reopened, the Petitioner notified of the new 1-A Classification, and he was allowed to appeal the classification, all in partial or complete compliance with Sections 1625.2, 1625.11, 1625.12 and

1625.13 32 C.F.R. To achieve a contrary result, that is to say, as did the Appellate Court in its opinion, that the local board did not classify the Petitioner anew, in the face of the file of the Petitioner is, the Petitioner respectfully urges, not consonant with the facts as they are, a distinct judicial misinterpretation of heretofore uncontroverted administrative acts which has created new error where none should be, and a needless diffusion and dilution of effective regulations.

If the local board made a conscious effort to comply with the regulations just mentioned, and the record shows that they did, then they should be made to comply with all the regulations that apply. This includes Section 1625.14, 32 C.F.R. which requires that after classification anew the Petitioner be ordered to report for induction in the usual manner; the Petitioner urges that this regulation was not complied with and he was denied procedural due process of law when the local board deviated from the usual manner of inducting registrants by not ordering him to report for a physical examination and giving him the usual 21 day waiting period thereafter **before** ordering him to report for induction (see Sections 1628.10 and Section 1631.7 C.F.R.). This is squarely the point which the Appellate Court felt it need not decide. (Appendix A, page 5 of the Appellant Court's Opinion.)

Before concluding, the Petitioner draws attention to the Appellate Court's statement (on page 4 of its Opinion) with reference to the lack of citation of authority by the Petitioner for the proposition that a failure to provide the second physical examination and the 21 day delay would so materially affect the rights of a selectee as to nullify an order for induction. The Petitioner feels this

is part and parcel of the question the Appellate Court did not decide. The Petitioner believes this point has been sufficiently clarified in this Petition. If not, with the Court's permission, may we here reiterate: a registrant has a right to demand a physical examination before he can be ordered to report for induction, and further, a registrant who is not delinquent or a volunteer cannot be ordered to report for induction without first being given his physical examination and the 21 day waiting period. Sections 1628.10 and 1631.7, 32 C.F.R.; Miller v. United States, supra; Mason v. United States, supra. As a matter of fact, should a registrant fail to report for his physical when ordered he may be considered as delinquent and inducted immediately even if his case is under appeal. United States v. **Hertlein,** 143 F Supp 742. The Petitioner respectfully urges that the mere fact the procedure was spelled out in regulations guarantees the necessity of strict compliance by the local board, not to mention the holding in the cases cited above. The requirement of physical examination before an order to report for induction, among other things, relieves registrants of serious embarrassment and inconvenience and the hardship of making definitive arrangements for cessation of civilian affairs which would be abortive if the registrant were rejected. United States v. Balogh, supra. In the Petitioner's case his last physical examination was more than two years old so that his request that he be physically examined and be given the 21 day waiting period before ordering him to report for induction was not so unreasonable as to shock the conscience. If failure or refusal by a registrant duly to obey an order to report for a physical examination, given in proper time during a classification, is so serious an offense that the registrant can be summarily inducted by the local board, United

States v. Hertlein, supra, then failure or refusal by the local board duly to provide an order for a physical examination in proper time during a classification is equally as serious an offense and a local board's order to report for induction that has omitted this necessary and vital step is a nullity, the induction void, and the entire procedure a denial of procedural due process of law. Tung v. United States, supra.

The decision of the Fifth Circuit, as regards the issue raised by that Court on its own motion, as well as the two questions presented by the Petitioner for decisions, one of which the Appellate Court elected not to decide, present questions that should be resolved in the interests of orderly administration of the Selective Service laws. Certainly the questions are important for future cases of the same type that may arise. This Court should grant the writ and determine the questions.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons above stated.

Respectfully submitted,

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January, 1959

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17202

MARVIN IRVING TAMARKIN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 5, 1958.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This appeal from a conviction of violation of the Universal Military Training & Service Act, as amended, 50 U.S.C.A. App. 462, presents two questions for our consideration: Did the trial court err in not finding appellant a proper subject for classification as a conscientious objector as described in the Act, and was the conviction of appellant void because

of a failure of the draft board to grant him a twenty-one day waiting period before induction after his last notice of 1A classification?

As to the first question raised on appeal, the Supreme Court has defined the scope of the Court's review of the draft board's classification determinations. The Court said "It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson v. U. S.*, 346 U.S. 389, 396 (1953). The classifications can be overturned only if 'it has no basis in fact.' *Estep v. United States*, 327 U.S. 114, 122 (1946)." *Witmer v. United States*, 348 U.S. 375.

We have carefully read the record before the draft board upon which alone the trial below must be based, and we conclude that evidence submitted by appellant himself in his initial written statement to the board furnished a basis in fact for the board's decision that appellant's beliefs in vegetarianism represented "essentially political, sociological, or philosophical views, or a merely personal moral code," as distinguished from "belief in a relation to a Supreme Being involving duties superior to those arising from any human relations." 50 U.S.C.A. App. 456(j).

Appellant's second contention arises in the following manner: On April 13, 1954, appellant was classified 1A. He was duly ordered to report for induction after having

been furnished with a certificate of acceptability (D.D. Form No. 62) after his pre-induction physical examination more than 21 days before the date fixed for his induction. He reported but refused to submit to induction. He was reported as delinquent, and prosecution for violation of Selective Service System regulations was recommended. On September 19, 1955, the United States Attorney declined to prosecute on the ground that procedural due process of law had been denied the appellant when he was not given a fair resume of the investigation of his background as made by the F.B.I. *Gonzalez v. United States*, 348 U.S. 407. On October 20, 1955, without further action by appellant or hearing before the board, appellant was notified again of his 1A classification and given an opportunity to appeal to the board for a reopening or rehearing as to his status. He applied for such rehearing within the proper time, and the rehearing was denied by the board on January 12, 1956, the board stating "the board declined to reopen your classification and therefore your file will be forwarded immediately to the appeal board." Thereafter, following the appeal board procedure, which finally resulted in a refusal to change the classification, the local board notified appellant on July 6, 1956, of the appeal board's action and also sent him an order to report for induction on July 23, 1956. On July 26, 1956, the appellant would have become twenty-six years of age, and, therefore, under existing regulations of the Selective Service, ineligible for the draft. Appellant reported for induction but refused to submit to induction.

Appellant claims that upon the final notice to him of the adherence by the local board to its 1A classification,

he was thereafter entitled to a pre-induction physical examination and twenty-one days' delay. This contention is predicated on the provisions of Section 1625.11 of the Selective Service Regulations, 32 C.F.R. 1625.11,[1] and Section 1631.7, 32 C.F.R. 1631.7.[2]

Appellant contends that notwithstanding his having received a certificate of acceptability and his pre-induction physical examination at least 21 days before the date fixed for his earlier induction order, and thus, of course, much more than twenty-one days before the date fixed by the induction order of July 6, 1956, he was nevertheless entitled again to such pre-induction physical examination and twenty-one days' delay after the termination of the appeal procedure which has been recited above.

Appellant cites no authority for the proposition that a failure to provide the second physical examination and the twenty-one day delay would so materially affect the rights of a selectee as to nullify an order of induction.

1 "1625.11 Classification considered anew when reopened. When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened."

2 "1631.7 Action by local board upon receipt of call. Each local board, upon receiving Notice of Call on Local Board (SSS Form #201) from the State Director of Selective Service for a specified number of men shall select, and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the armed forces and to whom the local board has mailed a certificate of Acceptability (DD Form #62) at least 21 days before the date fixed for induction: . . ."

even though it be assumed that the regulations require such proceedings. We need not decide this point, however, because reference to the regulations themselves compel the conclusion that the local board did not "reopen the registrant's classification" and it did not "again classify the registrant," which alone would bring to bear the provisions of 1631.7, upon which appellant so strongly relies. Section 1625.2 provides the circumstances under which a registrant's classification may be reopened and considered anew. The record of the board which is here before us, clearly shows that neither "upon the written request of the registrant," nor "upon its own motion" did the local board reopen Tamarkin's classification anew at the time it sent him the notice on October 20, 1955, from which he subsequently appealed. In fact he later requested the board to reopen his classification and this request was denied by the board's letter of January 12th, in which it stated "the board declined to reopen your classification." Thus there has been no reopening by the Board as contemplated under

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"1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1625.11, and therefore the rights that would have accrued to Tamarkin if there had been a reopening and reclassification did not arise.

The error underlying appellant's argument on this branch of the case lies in his assumption that the notification sent him by the board on October 20, 1956, (sic 1955) amounted to a reopening and reclassification in the sense in which the terms are used in Section 1625.11.

Concluding, therefore, that there is no merit in the contention that the board's decision lacked a "basis in fact" and that no procedural rights of appellant were denied him, we AFFIRM the judgment of the trial court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 9732-M-Criminal

UNITED STATES OF AMERICA

V.

MARVIN IRVING TAMARKIN

OPINION

This cause came on before the Court for trial upon Defendant's plea of not guilty, and waiver of jury trial. After evidence had been offered, Defendant moved for a Judgment of Acquittal. The case was taken under advisement and briefs submitted by counsel.

The Defendant was indicted and tried for failing, refusing and neglecting to submit to induction on July 23, 1956, and take the oath as required by law in violation of 50 U.S.C. App § 462 (Universal Military Training and Service Act of 1948).

The evidence in this case shows that the Defendant registered under the Selective Service System on September 17, 1949 at the age of 18. On December 19, 1950, he was classified 1-A by his local Selective Service Board. This was followed by various appeals and reclassifications. Finally, on April 13, 1954, he was ordered to report for induction. The Defendant reported, but refused to submit to the induction process. Prosecution was commenced, but then dropped for alleged violation of procedural due process in the administrative classification processes.

On October 20, 1955 the Defendant's classification was re-opened and considered anew. At this time the Defendant was again placed in Class A-1. He appealed his classification on the basis that under his religious beliefs he was entitled to exemption from induction as a conscientious objector. Pursuant to that appeal, he appeared before Mr. Henry K. Gibson, Special Hearing Officer for the Department of Justice. Mr. Gibson prepared a report which was then reviewed by Mr. T. Oscar Smith, Special Assistant to the Attorney General, who recommended that, despite Defendant's belief, he be classified as 1-A. The Appeal Board apparently acting upon this recommendation, and the evidence adduced at the hearing, did not grant the defendant's appeal.

The evidence introduced at the hearings and considered by the Appeal Board indicated that the Defendant has a sincere belief in his cause, and that it was treated by him as a "religion". However, there was other evidence that his "religion", that of vegetarianism, was regarded by other vegetarians as a philosophy and dietary way of life, rather than a religion. The fundamental philosophy of the American Vegetarian Union a non-sectarian organization, to which the Defendant belongs, has been described as the belief that all life is sacred, and that the privilege of taking it belongs only to God. The Defendant asserts a belief in a Supreme Being, and that no animal should be killed for food purposes. His belief further excludes the killing of human beings.

On July 6, 1956, the Defendant was notified of the Appeal Board's decision. At the same time, he received an order to report for induction on July 23, 1956, just three days prior to his 26th birthday, and the age limit for being

inducted into the armed forces. He was not given a new physical examination or allowed the 21 day waiting period subsequent to notion of induction. However, he had received such examination and waiting period in his prior classification and notice of induction.

The Defendant reported at the induction station on the appointed day, but refused to submit to induction.

During the trial before this Court, the Defendant offered testimony as to his "religious" beliefs at all times relevant to this case. He stated that he is opposed to taking animal life for food purposes, and that this belief extends to the slaying of humans. Defendant offered various "bible scriptures" to support his view that the killing of animals was wrong. However, he admitted that he could serve in the armed forces so long as killing was not required.

Section 6(j), Universal Military Training and Service Act of 1948, (50 U.S.C. App. § 456) under which the defendant seeks relief from military service, provides generally that no one shall be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical view or a merely personal moral code.

This Court can overturn the Selective Service System's refusal to grant Defendant conscientious objector

status only upon a showing that their classification was no basis in fact.

It cannot be said that there was no basis in fact for the Selective Service Board's classification in this case, and they could, and did find, that the Defendant's beliefs were not of a religious nature. The views of the Defendant, other vegetarians, and the society to which the Defendant belongs, indicate that his beliefs are more of a philosophical nature. The term "religion" is broader than such a philosophy or a merely personal moral code. While each man may find God in his own way, to grant the Defendant an exemption from service on the basis of his "religion of vegetarianism" would open the door to evasion of our Selective Service laws by diverse and unlimited varieties of individual "religious" expression. Certainly in this case the defendant has not shown that he is opposed to "participation in war in any form", but at best is by reason of dietary training and belief opposed to taking any type of animal life for food purposes, and secondarily because he believes that the vegetarian diet has support in religious words which indicate that killing of animals are wrong. This man can even by his own admission act in a variety of ways in the armed services so long as killing is not required. This he refuses to do. Further he has indicated that his belief rises primarily from dietary training rather than a relationship with a Supreme Being.

It would further appear that Selective Service Regulation 1628, relative to the reclassification of registrants does not of itself require additional physical examinations or certificates of eligibility once such have been given. The appropriate physical examinations were conducted as required by Selective Service and Army Regulations.

From the foregoing, it is the opinion of this Court that there is a basis of fact for the finding and classification of the Defendant as 1-A by the Selective Service System, and further that the defendant was not denied procedural due process by failing to receive a new physical examination and 21 day waiting period prior to induction.

Accordingly, Defendant's motion for Judgment of Acquittal will be denied. The Court finds the Defendant guilty as charged in the indictment.

DATED this 6th day of March, 1958 at Miami, Florida.

EMETT C. CHOATE
UNITED STATES DISTRICT JUDGE